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434921—57

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 283

CHOW BING KEW, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 198) is not yet reported. The opinion of the District Court on motions for judgment of acquittal (R. 5) is reported at 141 F. Supp. 253.

JURISDICTION

The judgment of the Court of Appeals was entered on May 20, 1957 (R. 204). A petition for rehearing was denied on June 18, 1957 (R. 205). The petition for a writ of certiorari was filed on July 16, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the indictment charged, the evidence proved, and the judge as trier of facts found that petitioner's false representation that he was a citizen of the United States was willful.

2. Whether a false statement as to citizenship on an application for a liquor license constitutes a violation of 18 U. S. C. 911 even though citizenship is not a condition for the license.

STATUTE INVOLVED

18 U. S. C. 911 provides:

> Whoever falsely and willfully represents himself to be a citizen of the United States shall be fined not more than $1,000 or imprisoned not more than three years, or both.

STATEMENT

In a two-count indictment filed in the United States District Court for the Northern District of California, petitioner was charged with knowingly and unlawfully representing himself in 1952 to be a citizen of the United States in violation of 18 U. S. C. 911, and with making, in 1953, a false statement to an investigator of the Immigration and Naturalization Service in violation of 18 U. S. C. 1001. After a trial by the court, petitioner was found guilty (R. 14) and sentenced to imprisonment for 18 months on each count, the sentences to run concurrently, and to fines of $1,000 and $5,000 on the first and second counts, respectively (R. 181, 182). The Court of Appeals affirmed the convictions as to Count 1 (R. 203, 204), but reversed as to Count 2, on the ground that the

count was fatally defective in failing to name anyone as committing the crime (R. 199, 204).

The government showed that petitioner, who was born in China and legally admitted to this country in 1929 as a merchant's son (R. 36, 37), had in 1952 made an application for renewal of a state alcoholic beverage license for a store (R. 30). The application, on a printed form, bore twelve questions, the eighth of which was, "Are you a citizen of the United States?" The typewritten answer was "yes." The form bore the notarised signature of "Sam Wahyou," the alias of petitioner, immediately below the following words:

> Each person whose signature appears below being first duly sworn, deposes and says: * * * (2) that I have read the foregoing application and know the contents thereof and that each and all of the statements therein made are true; (3) that no person other than the applicant or applicants has any direct or indirect interest in the applicant's or applicants' business to be conducted under the license(s) for which the application is made.

An investigator of the Immigration and Naturalization Service, having received information that a Chinese man known as "Sam Wahyou" was falsely claiming to be a native-born citizen, and finding records which led him to believe that "Sam Wahyou" might in reality be "Chow Bing Kew," questioned petitioner in April, 1953. Petitioner told the investigator, "I am a citizen of the United States. I was born in Sacramento, California" (R. 36–43). In June 1953, after a warrant of arrest had been is-

sued, petitioner, upon advice of counsel, admitted his true identity to the same investigator (R. 47–49).

Petitioner had made the same misrepresentation as to his birthplace on a passport application in 1947 (R. 46), and on applications for life insurance before and after his admissions to the Immigration Service in 1953 (R. 137–147).

Petitioner, taking the stand in his own defense, confirmed the evidence of his birth in China in 1912 and his arrival in this country in 1929 (R. 111). He testified that, from the year 1934 to the year 1953, he believed that he was a citizen as the legally adopted son of one Charlie Wahyou, a United States citizen (R. 132). He explained that his admiration for Wahyou, who was "100 percent Americanized," led him to ask Wahyou time and time again if he, too, could become an American citizen (R. 114–115). Wahyou consulted an attorney, and in 1934 the two told petitioner that papers issued to him were legal citizenship papers, and that he had been "adopted" by Wahyou (R. 118–119). Petitioner's counsel introduced records which showed the 1934 proceedings to have been not an adoption proceeding, but a petition to establish birth in which an order was issued by the Sacramento County, California, Superior Court, establishing petitioner's birth in Sacramento as Donald Harold Wah You, a son of Charlie Wahyou (R. 122). An infant named Donald Wahyou, the natural son of Charlie Wahyou, had in fact been born in 1917, but had died in 1918 (R. 33). Petitioner was aware of that fact in 1940 (R. 133). Petitioner testified that he questioned as untrue the information that he was born in the

United States (R. 119, 121, 136), but that he was told by Wahyou, the lawyer, and another lawyer whom he subsequently consulted, that it was legal (R. 118–121). Both of the attorneys involved and Charlie Wahyou were dead at time of trial (R. 124).

With respect to the misrepresentation on the 1952 license application, petitioner testified that he did not read it (R. 125); that he, as president of several corporations operating supermarkets and other businesses (R. 110), signed from 200 to 300 documents a week; and that he relied on others who submitted the papers to him (R. 125). One Helton, a supervisor of stores working under petitioner, testified that it was he who had submitted the application to petitioner (R. 99). He said that a clerk in the office of the State Board filled it out (R. 99), that he took it to petitioner who signed it but did not read it (R. 101), and thereafter had it notarized although petitioner was not present for verification (R. 99).

Petitioner explained that he signed personal insurance applications the same way, without reading the statements that he was born in Sacramento (R. 143, 147).

ARGUMENT

1. Petitioner argues that the willfulness of his false representation was not adequately charged, proved, or found by the trial judge. His contentions are without merit.

a. Although the indictment did not allege that petitioner "willfully" made a false representation, the allegation that he "did knowingly, and unlawfully

falsely represent himself to be a citizen" necessarily imported willfulness. See *Howenstine* v. *United States,* 263 Fed. 1 (C. A. 9); *Londos* v. *United States,* 240 F. 2d 1 (C. A. 5), certiorari denied, 353 U. S. 949; see also *Hagner* v. *United States,* 285 U. S. 427.

b. There was ample evidence to indicate that petitioner was aware of the 1952 misrepresentation. The judge was not required to credit petitioner's explanation that he did not read important papers which he signed. The fact that petitioner consistently, before and after the particular allegation charged in the indictment, falsely claimed citizenship by birth tends to negate petitioner's claim of carelessness. The evidence of these other misrepresentations was properly admissible to show intent. 2 Wigmore, *Evidence,* Section 302 (3rd ed. 1940).

c. The trial court did in fact make a finding of willfulness. Petitioner takes from the court's opinion on motions for acquittal an isolated statement out of context in an effort to show that the decision as to guilt was erroneously reached upon a finding of carelessness. The court said that any brash carelessness—such as the claimed practice of a president of several corporations in signing documents presented him by employees or attorneys without reading them—*emphasized* petitioner's criminality (R. 8). The opinion as a whole shows that the court found this criminality to exist. And the court's judgment was based upon a formal finding that petitioner "did *knowingly and unlawfully falsely represent himself to be a citizen of the United States* * * *" (R. 21; emphasis added).

2. Petitioner contends that no violation of the statute was proved because the question of his citizenship was immaterial to the issuance of the 1952 beverage license. In this connection he argues that the word "willfully" necessarily implies a fradulent purpose.

The fact that the laws of California do not require that a licensee of the type involved here be a citizen (Pet. App. B) does not make the false representation either irrelevant or lacking in fraudulent purpose. The state had a legitimate right to inquire as to the background and status of a prospective licensee, whether or not the fact of citizenship would be controlling. That is all that the statute requires. *Smiley* v. *United States*, 181 F. 2d 505 (C. A. 9); *United States* v. *Achtner*, 144 F. 2d 49 (C. A. 2); *United States* v. *Tandaric*, 152 F. 2d 3 (C. A. 7). And since petitioner did intend to give a false reply to a legitimate question by the state, his purpose was fraudulent.

Actually, the statute does not require that a fraudulent purpose be alleged or proved. *DePratu* v. *United States*, 171 F. 2d 75 (C. A. 9); *United States* v. *Franklin*, 188 F. 2d 182 (C. A. 7). The precise meaning of the word "willfully" depends upon the context in which it is used. See *Screws* v. *United States*, 325 U. S. 91, 101; *United States* v. *Illinois Central R. Co.*, 303 U. S. 239; *United States* v. *Murdock*, 290 U. S. 389. The words "willfully" and "knowingly" can be used to denote "deliberately and with knowledge and not something which is merely careless or negligent or inadvertent." See *Browder* v. *United States*, 312

U. S. 335, 341. It is in this sense that the word "willfully" is used in 18 U. S. C. 911. Petitioner concedes that Congress in enacting the predecessor section in the Nationality Act of 1940 (54 Stat. 1165, 8 U. S. C. (1946 ed.) 746) dropped the words "for any fraudulent purpose whatever" found in the earlier statute (35 Stat. 1103) and punished one who "knowingly" falsely represented himself to be a citizen, but asserts that, when the 1948 revision of the criminal code substituted the word 'willfully" for the word "knowingly," there was an intent to re-embrace the ingredient of bad intent. However, when the 1948 revisers intended to make an intent to defraud an element of a crime, they used clear language to such effect. *E. g.* 18 U. S. C. 915, 916. It seems evident, therefore, that "willfully" was used in this section as the equivalent of "knowingly" in the predecessor statute.

CONCLUSION

It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

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